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Supreme Court, U.S.
FILED

No. 03 293 AUG 20 2003

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In The

Supreme Court of the United States

LCT TRANSPORTATION SERVICES, INC. a/k/a
LESTER COGGINS TRUCKING, INC.,
a Florida corporation,

Petitioner,

v.

VICTOR BARRAGAN, JORGE TORRES,
ROBERTO CAIAFFA, and ERVING G. PENA,
Florida citizens,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an award of attorney fees must be commensurate with the results obtained?

II. Whether an award of attorney fees may include compensation for unnecessary hours and exceedingly vexatious litigation?

RULE 29.6 STATEMENT

Gainey Corporation is the parent company of Petitioner Lester Coggins Trucking, Inc. ("LCT"). No other publicly held corporations or companies owns more than 10% of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

LCT Transportation Services, Inc. ("LCT"), a Florida corporation, petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals for the Eleventh Circuit (Circuit Judges Hull, Marcus and Farris) is not reported and is reprinted in the Appendix to this Petition ("App.") at 1-4. Order of the United States District Court Southern District of Florida, Miami Division Adopting the Magistrate's Report and Recommendation filed September 6, 2002 is reprinted and attached at App. 5-8. The opinion of the United States Court of Appeals for the Eleventh Circuit denying LCT's Petition for En Banc Rehearing filed on May 22, 2003 is reprinted and attached at App. 8-10.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on March 28, 2003. On April 18, 2003, LCT filed a timely Petition for En Banc Rehearing. On May 22, 2003, the United States Court of Appeals for the Eleventh Circuit denied LCT's Petition for En Banc Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 29 U.S.C. § 216(b) providing for an award of a reasonable attorney's fee to a prevailing plaintiff in an equal pay action.

STATEMENT OF THE CASE

This is a suit for alleged violation of the Fair Labor Standards Act ("FLSA"), in which the Plaintiffs are challenging their status as "exempt" employees under the FLSA exemptions for "loaders" and "drivers." In addition, they are claiming that the company acted in bad faith such that the company should be required to pay damages for three years, instead of two, and should be required to pay double that amount as "liquidated" damages.

Although the jury found in Plaintiffs' favor on the "loader" issue, Plaintiffs lost on the "driver" issue and lost on the issue of "bad faith." In addition, the trial court rejected Plaintiffs' request for liquidated damages, rejected their claim for injunctive relief and denied their motion for certification of the case as a "collective" action. Thus, the Plaintiffs lost on most of the claims presented and recovered only a fraction of what they were seeking.

Throughout the case, Plaintiffs wasted enormous amounts of time and attorneys' fees seeking discovery that was irrelevant to the claims and filing motions (including motions for reconsideration of motions that had been denied as being untimely), which were repeatedly denied by the trial court. Despite those circumstances, the trial court awarded costs and fees to Plaintiffs in excess of

$160,000.00, as compared to a judgment of less than $20,000.

Because the award of fees does not bear any reasonable relationship to the results obtained or the amount of time that was actually needed to prepare for and try the case, Defendant is requesting review by this Court. In addition, Defendant is requesting review by this Court because it is obvious from this case and others that the lower courts really do not understand and are struggling to apply the standard for determining an appropriate award of fees.

A. Events Leading to Trial

In November of 2000, the parties agreed that any motion for class certification would be filed by December 11, 2000. Despite that agreement, Plaintiffs did not file any motion for class certification

In October of 2000, Defendants requested dates for Plaintiffs' depositions, but no dates were provided. When dates were eventually provided, Plaintiffs insisted on deposing the company witnesses first. After several exchanges of correspondence, Plaintiffs eventually agreed to a deposition schedule, but then sought to frustrate the depositions by repeatedly canceling depositions or walking out.

In March of 2001, Plaintiffs filed a motion to strike certain portions of LCT's answer to the Complaint, as being "vague or ambiguous." Relying upon the plain language of Fed.R.Civ.P. 8, the Court summarily denied Plaintiffs' motion.

In April of 2001, Plaintiffs filed a motion to certify the case as a "collective action," but the Court denied that motion as being untimely. Plaintiffs then filed a motion for reconsideration, but the Court denied that motion as well.

In May of 2001, Plaintiffs accused LCT of falsifying records relating to safety training and then spent the next several months trying to establish that the records had been falsified, even to the point of hiring a document expert. When the case got to trial, the trial court ruled that the safety training issue had absolutely nothing to do with the case and, therefore, the jury would not be allowed to consider any such evidence.

In June of 2001, LCT attempted to depose Juan Rodriquez but Plaintiffs cancelled on the morning of the deposition, claiming that the company had not produced Rodriquez's "driving logs." Prior to the deposition Plaintiffs had made no request for the driving logs.

On July 10, 2001, LCT attempted to depose Victor Barragan, but Barragan walked out before the deposition was concluded. As justification for terminating the deposition, Plaintiff objected because Barragan was being questioned about a written job description that was unfavorable to Plaintiffs' position. During the deposition, Plaintiffs' counsel also raised attorney-client objections and instructed the witness not to answer questions on grounds of attorney-client privilege, even though it was clear that the communications were not protected by the attorney-client privilege.

On July 11, 2001, LCT attempted to depose Erving Peña, but Plaintiffs refused to proceed with the deposition, claiming that the witness was being intimidated by the company's representative, Alvaro Garcia. Although

Plaintiffs knew that Garcia would be present at the deposition (having participated in several similar depositions without any objection), Plaintiffs did not object until the morning of the deposition and then filed an "emergency" motion to have him sequestered. Because there was no evidence that Garcia had done anything to intimidate the witness, the Court summarily denied the Plaintiffs' motion.

The next day Defendant attempted to depose Roberto Caiffa, but that effort was thwarted by Plaintiffs' counsel, who insisted upon taking a "break" at a crucial moment in the deposition so that she could coach Mr. Caiffa. Prior to the "break," Mr. Caiffa had made several damaging admissions regarding the exempt nature of his duties; after the break he changed his testimony, claiming that he only did what his supervisor told him to do.

In August of 2001, Plaintiffs filed a motion to strike LCT's pleadings and for entry of default judgment, but the Court denied that motion as being untimely. Plaintiffs then filed a motion for reconsideration, but the Court also denied that motion, stating that Plaintiffs were "***try[ing] the patience of this Court***." (Emphasis added.)

In September of 2001, the case was scheduled for trial, but the trial court adjourned the trial. Due to the adjournment, both sides incurred additional fees. However, LCT was not in any way responsible for the adjournment.

B. Trial

In October of 2001, the case was tried to a jury, with Alice Hector and Alba Varela presenting the Plaintiffs' case. Based on the evidence presented, the trial court

found that Rodriguez was clearly exempt under the "driver" exemption and therefore granted a directed verdict on that claim.

As to the remaining Plaintiffs, who worked as loaders only, the jury found that LCT had made a mistake in classifying them as exempt, but had acted in good faith. As a result, the trial court denied Plaintiffs' request for "liquidated damages" and reduced Plaintiffs' recovery from three years to two years of back pay. Thus, the total amount of the award for all four of the "prevailing" Plaintiffs was only $19,859.33.

During the trial the issues with respect to the "prevailing" Plaintiffs were limited to (1) whether those Plaintiffs make decisions when they are loading trucks and (2) what information did the company rely on in concluding that the Plaintiffs were exempt. Although the Plaintiffs went first, the Defendant had the burden of proof as to both the exemption issue and the good faith issue. The proofs were simple and the entire trial took less than three days.

On several occasions during Plaintiffs' examination of witnesses the trial court had to instruct Plaintiffs' counsel with respect to trial "basics." Such basic instruction by the trial court included how to ask a non-leading question, how to ask questions that do not call for opinion, how to offer an exhibit and how to slow down so that the court reporter could make a record. At one point, the court became so frustrated as to excuse the jury and to instruct Plaintiffs' counsel in detail as to the difference between witness testimony and her "simply testifying" for the witness.

C. Post Trial Proceedings

After trial Plaintiffs submitted a proposed judgment, which included an award of injunctive relief as to which no proofs had been prevented and judgment in favor of Rodriquez, as to when the court had granted a directed verdict. Given that injunctive relief is not even available to individual Plaintiffs suing under the FLSA, the trial court summarily denied the request for injunctive relief. As to Rodriquez, the trial court had to remind Plaintiffs that his claim had been dismissed.

On January 18, 2002, Plaintiffs filed a Motion for Attorney Fees and Costs, claiming that the total fees needed to prepare for and present this simple case were in excess of $222,000.[1] In support of the fee petition, Plaintiffs' counsel provided their billing records, but many of the entries were in "block" form, such that it was impossible to separate the time as between the successful and the unsuccessful claims.

After hearing oral argument on the fee petition, the Magistrate found that the rate charged by Alice Hector ($350 per hour) was excessive and, therefore, he reduced it to $300 per hour. In addition, he found that a reduction of 20% was required due to the "block billing" and the verdicts in favor of the company as to the Rodriquez claim and the "willfulness" claim. However, the Magistrate did not consider whether any further reduction was required based on other claims decided in favor of LCT; nor did he consider whether any further reduction was required

[1] Plaintiffs' request of $222,963.83 represented a requested award of $203,104.50 in attorneys' fees and $40,874.71 in costs.

based on the many unnecessary and excessive hours charged by Plaintiffs' counsel.

Upon review of the Magistrate's recommendation, the trial court agreed that a rate of $300 per hour was appropriate. Order of the United States District Court, Southern District of Florida, Miami Division Adopting the Magistrate's Report and Recommendation filed September 6, 2002 is reprinted and attached at App. 5-8. He also agreed that a 20% reduction was appropriate, but did so on the grounds that the hours expended by Plaintiffs' counsel were "excessive and unnecessary." *See id.* The trial court did not consider whether a further reduction was required based on the "results obtained" and the "block billing." *See id.* Thus, the total amount of the award was $146,152.49 in attorneys' fees and $12,164.29 in costs, as compared to only $19,859.33 in recovery. *See id.*

After the Magistrate had conducted a hearing on the fee petition, and had also issued a report and amended report, Plaintiffs requested an additional award for fees incurred in preparing and presenting the fee petition. The trial court denied that petition as untimely.

D. Appeal

On appeal the Eleventh Circuit affirmed the trial court's award, but did not address any of the arguments raised by LCT; nor did the Eleventh Circuit even explain its decision. Instead, the Eleventh Circuit simply affirmed.

REASONS FOR GRANTING THE WRIT

Under Rule 10 of the Supreme Court Rules, a petition for certiorari is appropriate when (1) the decision is in conflict with this Court's own precedent; (2) the decision below has created a direct conflict in the circuits; and (3) the case presents significant issues of nationwide importance. In the present case each of these grounds exist.

I.

The Lower Court Decision is in Direct Conflict with a Decision of this Court.

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) this Court held that an award of attorneys' fees must bear a reasonable relationship to the "results obtained." Thus, when the Plaintiff has failed to achieve a "level of success" that is commensurate with the results obtained, the award of fees should be reduced. *See also Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("the degree of the plaintiff's overall success goes to the reasonableness of a fee award").

In addition, the award must be reasonable, taking into consideration the hours needed to prepare and try the case. *See Hensley,* 461 U.S. at 434 (stating that "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.") When the hours of work are unreasonable or unnecessary, the award of fees must be adjusted. *See id.*

Here the trial court reduced the award based on the fact that the hours expended by Plaintiffs' counsel were unnecessary and excessive. However, the trial court reduced the award by only 20%, whereas the record clearly

demonstrated that at least 80% of the hours expended were completely unnecessary. Moreover, the District Court Judge did not give any consideration whatsoever to the fact that Plaintiffs were unsuccessful on most of the claims presented. Conversely, the Magistrate Judge reduced the award based on the results obtained, but did so by only 20% and did not make any finding as to whether the hours were reasonable. Both decisions are in conflict with *Hensley* not only because they did not consider all of the relevant factors, but also because they did not give proper weight to those factors, especially as to the results obtained.

II.

The Lower Court Decision Creates a Conflict Among the Circuits.

Consistent with the Supreme Court's holding in *Hensley,* the Courts of Appeals have regularly held that "reasonableness implies commensurability with results obtained." *See Bristow v. Drake Street, Inc.*, 41 F.3d 345, 353 (7th Cir. 1994); *D.L.S., Inc. v. City of Chattanooga*, 149 F.3d 1182 (6th Cir. 1998) (unpublished) (award of fees should be "commensurate with the relative relief obtained"); *McDonald v. Miller Oil Co.,* 134 F.3d 638, 641 (4th Cir. 1998) ("degree of success obtained" is critical in determining amount of fee award). Thus, when the "results obtained" are meager, in comparison to the hours expended, the fee award has been reduced. *See Carroll v. Wolpoff & Abramson,* 53 F.3d 626, 630-631 (4th Cir. 1995) (reducing fee award from $10,000 to $500 where plaintiff recovered only $50 in damages); *Shea v. Galaxie Lumber and Construction Co., Ltd.*, 221 F.3d 1339 (7th Cir. 2000) (unpublished) (reducing fees by 60% due to the fact that

Plaintiff recovered less than 11% of the damages she originally sought); *Spegon v. The Catholic Bishop of Chicago*, 175 F.3d 544, 558 (7th Cir. 1999) (reducing fees by 50%); *Black v. Lojac Enterprises, Inc.*, 117 F.3d 1420 (6th Cir. 1997) (unpublished) (reducing fees from $192,282 to $25,424); *Abdur-Rahman v. Pieron*, 934 F.2d 322 (6th Cir. 1991) (unpublished) (reducing fees by 40%); *Acuna v. Regents of the University of California*, 141 F.3d 1173 (9th Cir. 1998) (unpublished) (reducing fees by "50 percent" to account for Plaintiff's partial success). Similarly, the Courts of Appeals have refused to award fees for needless, wasteful or excessive work. *See Gradisher v. Check Enforcement Unit, Inc.*, 2003 WL 187416, *5 (2003) (reducing fees for excessive time spend on motions and brief and for duplication of effort by counsel).

Here the Court of Appeals has approved an award that is not only excessive in terms of the results obtained, but also is excessive in terms of the hours that were reasonably necessary for purposes of preparing and trying the case. Thus, the decision conflicts with the decisions reached by other Courts of Appeal.

III.

The Case Presents an Issue of Nationwide Importance.

As to whether the issues presented in this case are of nationwide importance, a recent article in the Wall Street Journal reports that FLSA litigation is on the rise. Michael Orey, *Lawsuits Abound From Workers Seeking Overtime Pay*, WALL ST. J., May 30, 2002, at App. 11-15. Thus, the number of litigants who will be affected by this decision will be significant.

Some courts have expressed frustration with the *Hensley* test noting that it is overly "subjective" and subject to "abuse." *See Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 245, fn. 8 (8th Cir. 1996). Others have complained that the *Hensley* test is confusing in that the factors used to determine the reasonableness of the hours (the "lodestar" amount) often overlap with the factors used to determine whether the hours ("lodestar" amount) should be reduced. *Generally see Evans v. Connecticut,* 967 F. Supp. 673, 692 fn. 26 (Conn. 1997) (referencing *Hensley* for the proposition that a court, in adjusting the lodestar amount, may consider the same factors used to determine the "lodestar" amount.). Some courts require the opposing party to identity each entry on the bill that is considered to be unnecessary or excessive; others take a more generalized approach. Some courts do it by motion; others require an evidentiary hearing. *See Norman v. Housing Authority*, 836 F.2d at 1304 (11th Cir. 1989) (stating that courts have discretion to determine whether an evidentiary hearing is necessary). Some courts stop their analysis after determining whether the hours were reasonable; others go on to determine whether any further reductions should be made based on the results obtained. *See Evans,* 967 F. Supp. at 692 (stating that an adjustment of the lodestar amount was improper since the *Hensley* factors were subsumed in the initial lodestar calculation); *see Thomas v. Cooper Industries, Inc.,* 640 F. Supp. 1374, 1382 (1986) (providing for an upward adjustment of the lodestar amount based upon the contingent nature of the case.). Some courts require detailed documentation by the party seeking attorneys' fees; others do not. Some give detailed findings; others do not. Because the lower courts are "all over the map" on these issues, there is a clear need for Supreme Court review.

In this particular case two different Judges, the Magistrate Judge and the District Court Judge, reached the same conclusion, but did so for entirely different reasons. During oral argument the Court of Appeals questioned whether the trial court had properly considered all of the factors and had made all of the necessary findings, with sufficient detail, but then affirmed without even explaining its decision. This further demonstrates, in the context of this particular case, that the lower courts are either confused as to what the *Hensley* test requires, or simply do not agree with the *Hensley* analysis. In either event, this Court needs to intervene.

Finally, in terms of significance, the issue in this case is similar to the issue in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 123 S.Ct. 1513 (2003) wherein this Court recently held that an award of "punitive" damages must bear some reasonable relationship to the amount of compensatory damages. In so holding the Court instructed lower courts to disapprove of punitive awards that are "neither reasonable nor proportionate to the wrong committed." *See id.* Here the situation is analogous in that the attorneys' fees awarded are wholly out of line with the results obtained.

CONCLUSION

For all of the foregoing reasons, the Petition should be granted and Judgment below reversed.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15542

D.C. Docket No. 00-02040 CV-JLK

VICTOR BARRAGAN, a Florida citizen on behalf of himself and all other Florida citizens similarly situated,
JORGE TORRES
ROBERTO CIAFFA,
ERVING E. PENA,

Plaintiffs-Appellants-Cross-Appellees,

JUAN RODRIGUEZ,

Plaintiff-Cross-Appellee

versus

LCT TRANSPORTATION SERVICES, INC., a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed March 28, 2003)

Before HULL, MARCUS and FARRIS*, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

---

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no presidential value, the judgment or order may be affirmed or enforced without opinion.

United States Court of Appeals
For the Eleventh Circuit

No. 02-15542

District Court Docket No.
00-02040-CV-JLK

VICTOR BARRAGAN, a Florida citizen on behalf of himself and all other Florida citizens similarly situated,
JORGE TORRES
ROBERTO CIAFFA,
ERVING E. PENA,

Plaintiffs-Appellants-Cross-Appellees,

JUAN RODRIGUEZ,

Plaintiff-Cross-Appellee

versus

LCT TRANSPORTATION SERVICES, INC., a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

(Filed Mar. 28, 2003)

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 28, 2003
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

VICTOR BARRAGAN, et al.,
Plaintiffs,

CASE NO. 00-2040-CIV-KING

v.

LCT TRANSPORTATION SERVICES, INC., a/k/a LESTER COGGINS TRUCKING, INC.,
Defendants /

ORDER ADOPTING REPORT AND RECOMMENDATION

(Filed Sep. 6, 2002)

THIS CAUSE is before the Court upon the July 3, 2002, Amended Report and Recommendation of Magistrate Judge O'Sullivan recommending that Plaintiff's Verified Motion for Attorney's Fees and Costs be granted in part and denied in part. Plaintiffs filed Objections on July 19, 2002. Defendant filed Objections on July 22, 2002, and responded to Plaintiff's Objections on August 5, 2002. Plaintiffs responded to Defendant's Objections on August 9, 2002, and filed a Reply on August 26, 2002.

Section 636(b)(1) of the Federal Magistrate's Act requires this Court to make a *de novo* determination of those parts of the Magistrate Judge's Report and Recommendation to which objection is made. 28 U.S.C. § 636(b)(1); *United States v. Raddatz*, 447 U.S. 667, 673

(1980); *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512-13 (11th Cir. 1990).

Plaintiffs seek $40,874.71 in costs and $203,104.50 in fees. Magistrate Judge O'Sullivan recommends that the Court award Plaintiffs $12,164.29 in costs and $146,152.49 in fees. Magistrate Judge O'Sullivan properly found that Ms. Hector's rate of $350.00 per hour is excessive in this Fair Labor Standards Act case and reduced it to $300.00 per hour. *See Norman v. Hous. Auth.*, 836 F.2d 1292, 1299-1301 (11th Cir. 1988) (discussing calculation of reasonable hourly rates).

Magistrate Judge O'Sullivan also recommended that total amount of hours Plaintiffs sought to be awarded be reduced by 20%. The Court finds that Plaintiff seek compensation for hours that were excessive and unnecessary and that the 20% reduction is warranted. *See id.* at 1301-02 (holding that excessive, redundant, or otherwise unnecessary hours should be excluded from the amount claimed and that such exclusions "must be left to the discretion of the district court."); *Loranger v. Stierheim*, 10 F.3d 776, 782-83 (11th Cir. 1994) (holding a district court may reduce an award figure in gross when ruling on a voluminous free request that includes excessive, redundant, or otherwise unnecessary hours).

Further, Magistrate Judge O'Sullivan did not recommend any award for fees associated with preparing the fees and costs motion because Plaintiffs did not provide any documentation or evidence to support that request for fees. Plaintiffs attached an affidavit to their Objections summarizing the fees and costs incurred in litigating the fees issue. There must, however, be some finality to this litigation regarding fees and costs.

Plaintiffs should have provided this documentation to the Court and opposing counsel so that Defendant could have responded to it and the Magistrate Judge considered it. The Court finds this request, included in Plaintiffs' Objection to be untimely, and will not award those fees and costs requested.

Therefore, concluding that the Report contains a thorough and well reasoned recommendation, the Court grants in part and denies in part Plaintiffs' Verified Motion for Attorney's Fees and Costs.

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Magistrate Judge O'Sullivan's July 3, 2002, Report and Recommendation be, and the same is hereby, AFFIRMED and ADOPTED. It is further ORDERED and ADJUDGED that Plaintiffs be awarded a total of $146,152.49 in attorney's fees and $12,164.29 in costs. Any pending motions are denied as moot. This case remains CLOSED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 5th day of September, 2002.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15542-HH

VICTOR BARRAGAN, a Florida citizen on behalf of himself and all other Florida citizens similarly situated,
JORGE TORRES
ROBERTO CIAFFA,
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Plaintiffs-Appellants-Cross-Appellees,

JUAN RODRIGUEZ,

Plaintiff-Cross-Appellee

versus

LCT TRANSPORTATION SERVICES, INC., a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellee-Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed May 22, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, ___ F.2d ___.

Before: HULL, MARCUS, and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT
JUDGE

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

2002 WL-WSJ 3396221

The Wall Street Journal
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Thursday, May 30, 2002

Lawsuits Abound From Workers Seeking Overtime Pay

By Michael Orey

What do insurance-claims adjusters, chicken processors and copy-machine technicians have in common?

They are among tens of thousands of workers around the country who lawsuits claim were cheated out of overtime pay by their employers. Employment attorneys say the number of these cases has exploded recently, partly because plaintiffs' lawyers, seeing the potential for big payouts, have rushed to file claims on behalf of large groups of employees.

Last year, the number of so-called collective actions brought under the Fair Labor Standards Act, the federal statute that sets wage and hour rules, exceeded the number of class actions alleging job discrimination. "It's the complaint du jour," says David Ross, an attorney in the New York office of Seyfarth Shaw, which represents employers.

The stakes can be high. Last year alone, SBC Communications Inc.'s SBC Pacific Bell settled a suit for $35 million, Coca-Cola Bottling Co. of Los Angeles settled a suit for $20.2 million, and Bank of America Corp. settled a suit for $22 million. In July, a state-court jury in Oakland, Calif., hit a Farmers Insurance Group unit with a $90 million verdict for failing to pay overtime to 2,400 of its claims adjusters in the state. (Farmers is appealing.)

Farmers also faces claims in federal district court in Portland, Ore., on behalf of its adjusters nationwide.

Wal-Mart Stores Inc. is defending overtime cases in 28 states. And in March, Minolta Business Solutions Inc. was sued in federal district court in New York by technicians seeking to represent people who service copy machines.

Overtime rules have been on the books since the 1930s, generally requiring payment of time-and-a-half to anyone working more than 40 hours a week. Laws in many states contain additional protections. The federal law, however, carves out dozens of exemptions for certain workers, including those deemed "managerial," "administrative" or "professional."

Plaintiffs' lawyers say companies improperly categorize employees to save on labor costs. "If you walk into to [sic] a lot of chain restaurants, you'd be astonished at how many 'managers' they have, most of whom are waiting on tables," says Richard Seymour, a Washington, D.C., attorney who represents workers. Similar disputes have arisen in newsrooms, including that of The Wall Street Journal, published by Dow Jones & Co. At issue is whether reporters are professionals. Camille Olson, a Seyfarth attorney who represents newspapers, says the answer depends on whether a paper is national or regional and how much a reporter's duties involve such things as analysis and expertise.

Farmers Insurance classified its claims adjusters as "administrators," when in fact, plaintiffs maintained they were more like production workers, with little discretion in how they did their work. This year, a New Jersey state appeals court found that Pepsi Bottling Group Inc. had improperly failed to pay overtime to delivery-truck drivers

and customer representatives in New Jersey. The company had classified these employees as "outside" sales people, another exempted category under the overtime law. Spokeswoman Kelly McAndrew says the company is in discussions with the New Jersey Department of Labor to bring the matter to a close.

Besides misclassification claims, the most common overtime complaint is that companies require employees to work off the clock. A suit filed against Wal-Mart in New York state court in Albany – typical of many filed against the chain around the country – alleges that store employees were routinely told to punch out when the store closed and then required to keep working.

William Wertz, a spokesman for Wal-Mart, says the company denies the allegations in the lawsuits. It is company policy "to comply fully with all federal and state wage and hour requirements" and to prohibit any off-the-clock work by hourly employees, Mr. Wertz says.

The complaint against Minolta Business Solutions, a subsidiary of Japan's Minolta Co., alleges that copy-machine technicians weren't paid for work performed after 5 p.m. and during unpaid lunch hours or for time spent on weekends purchasing work-related supplies. Allan Hans, general counsel for Minolta Corp. in Ramsey N.J., declines to comment on any active litigation but says, "It's our policy to pay people for the hours that they work."

The surge in overtime cases filed by class-action law firms began in California. State laws there are particularly "employee-friendly," says Tyler Paetkau, an attorney at McCutchen, Doyle, Brown & Enersen in San Francisco, who represents employers. To classify someone as a manager, for example, California requires an employer to

document that the person spends more than 50% of the time engaged in managerial functions, while federal law applies a more flexible standard.

The bulk of major settlements to date have involved companies' California operations.

With plaintiffs' lawyers now aggregating large numbers of claims in a single suit, Mr. Paetkau says damages can add up quickly. Employers found to have violated the federal wage and hour law typically must pay double the back wages owed, plus attorneys' fees.

Noting that many provisions of the federal law are decades-old, some employment lawyers say the law isn't always easy to apply to new job arrangements such as flex time. Calls to overhaul the statute haven't produced much progress. Instead, Congress tinkers. In 1996, for example, it said employers don't have to pay overtime to certain high-earning computer workers. That joins other exemptions on the books, including one for beekeepers.

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Question of the Day: Is overtime dispensed fairly in your workplace? Visit WSJ.com/Question to vote.

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All Work, No Extra Pay

Workers who may be exempt from overtime laws under the Fair Labor Standards Act

– Beekeepers

– Holly wreath weavers

– Truck drivers who cross state lines

– Seasonal amusement park workers

– All agricultural workers

– Retail salespeople whose commission earnings equal one and a half times the current federal minimum wage

Source: Department of Labor